Supreme Court, U.S.
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No. 93-1679

# In the Supreme Court of the United States

OCTOBER TERM, 1993

STEVEN ROBERT BRITENBACH, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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18 pp

## QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner should be sentenced as a career offender under Sentencing Guidelines § 4B1.1 when he was convicted of conspiring to distribute controlled substances and had previously been convicted on two drug trafficking felonies.

2. Whether the district court abused its discretion in denying petitioner's motion for a continuance.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The court of appeals issued two opinions (Pet. App. 1-8, 9-14).[1] One opinion is reported at 15 F.3d 830; the second is unpublished, but the decision is noted at 15 F.3d 1092 (Table).

### JURISDICTION

The judgment of the court of appeals was entered on January 24, 1994. The petition for a writ of certiorari was filed on April 25, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] For purposes of convenience, the petition appendix has been renumbered consecutively.

## STATEMENT

Following a jury trial in the United States District Court for the District of Idaho, petitioner was convicted on one count of conspiring to distribute controlled substances, in violation of 21 U.S.C. 846 and 841(a)(1), and six counts of interstate travel and telephone use in furtherance of racketeering, in violation of 18 U.S.C. 1952. He was sentenced to 360 months' imprisonment, to be followed by ten years of supervised release. He was also ordered to pay a $14,000 fine. C.A. Excerpt of Record 41-45. The court of appeals affirmed. Pet. App. 1-14.

1. Petitioner met co-defendants Dwayne Fitzen and Wayne Heim in 1988 while incarcerated in federal prison in Lompoc, California. Shortly after his parole in September 1989, petitioner provided one kilogram of cocaine on credit to Fitzen and Heim, who had returned from prison to the Pocatello, Idaho, area. Petitioner and his partner Michael Lace subsequently provided Fitzen and Heim with several kilograms of cocaine and large quantities of marijuana. On at least one occasion, petitioner and Lace travelled from southern California to Pocatello to discuss cocaine distribution and the money Heim owed petitioner. Presentence Report 4-10.

In October or November 1991, petitioner and his co-defendants participated in negotiations to supply 20 to 40 kilograms of cocaine per month to an individual in Salt Lake City, Utah. Petitioner, Heim, and the Salt Lake City buyer were in frequent telephone contact during their negotiations in October and November 1991. The plans were eventually abandoned, however, when the buyer reestablished contact with his former source of cocaine. Presentence Report 7-8.

The Pocatello drug trafficking operation began to unravel with the arrests of Heim and Fitzen in late February 1992. Petitioner became concerned that his

role would be discovered and that he would not receive the $22,000 still owed him (and his suppliers) by Heim. By March 1992, petitioner had begun to discuss resumption of the cocaine operation with co-conspirator Mike Wallace. The two men agreed that Wallace would pay more than the market price for each kilogram of cocaine until the $22,000 debt had been repaid. Presentence Report 8-9.

In May 1992, petitioner and Lace told Wallace that their supplier had 100 kilograms of cocaine. They agreed to provide Wallace with eight kilograms of cocaine, and another individual with five. On May 27, 1992, several hours before the transactions were to take place, petitioner and Lace were arrested in Los Angeles County, California. Presentence Report 9-10.

2. On May 14, 1992, petitioner was indicted in the District of Idaho in the second superseding indictment against Heim, Fitzen, and others. Due to a delay in receipt of the Fed. R. Crim. P. 40 papers from California, petitioner's arraignment and appointment of counsel did not occur until June 19, 1992. Trial was scheduled for August 11, 1992. On July 2, 1992, new trial counsel was appointed to represent petitioner. On July 15, 1992, the government returned a third superseding indictment, which extended the end date of the conspiracy from May 14, 1992, to May 27, 1992. Pet. 10-11; Gov't C.A. Br. 41-42; C.A. Excerpt of Record 62.

On July 16, 1992, petitioner moved for a continuance on the ground that his counsel had been appointed only 40 days before trial and thus had inadequate time to prepare. The government stated that it did not object to the request so long as trial for all defendants was continued. The government noted, however, that it had provided petitioner with full discovery and had offered to assist counsel in his preparation for trial. Pet. 11-12; Gov't C.A. Br. 42. The district court denied petitioner's

motion. Noting that the government had produced materials in discovery and that much of the evidence against petitioner was his own statements, the court held that the "difficulty of preparation" for petitioner's case was "not so great that it [could not] be accomplished in the time provided." C.A. Excerpt of Record 16-17.

On August 3, 1992, petitioner moved for reconsideration of the court's order. C.A. Excerpt of Record 29. He renewed his request at the start of trial on August 11, 1992. I Tr. 2. In objecting to the request, the government noted that it had dealt with five different attorneys who purported to represent petitioner, and that the many pre-trial motions filed by petitioner's attorney indicated that counsel was knowledgeable and prepared. I Tr. 11-12. The government attorney also expressed the view that "95 percent of the information the jury will rely on to convict [petitioner] comes out of his own mouth." I Tr. 12. The court again denied the motion, citing the government's open file policy and the "economy" in trying all of the defendants together. Pet. 12; Gov't C.A. Br. 43-44; I Tr. 25-26. Petitioner was convicted following a ten-day trial. Gov't C.A. Br. 2-3.

3. The Presentence Report determined that petitioner fell within Criminal History Category IV. Presentence Report 12-15. The Report recommended, however, that petitioner be sentenced under Guidelines § 4B1.1, which provides that career offenders will be assigned to Criminal History Category VI and will receive enhanced sentences. Under the Guidelines, a defendant is a career offender if

> (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is * * * a controlled substance offense, and (3) the defendant has at least two prior felony convictions of * * * a controlled substance offense.

Guidelines § 4B1.1. The Presentence Report concluded that petitioner's current offense, conspiracy to distribute cocaine and marijuana, was a controlled substance offense,[2] and that petitioner had two prior felony drug trafficking convictions—a 1978 federal felony conviction for importation of cocaine,[3] and a 1986 state felony conviction for possession of cocaine with the intent to sell it. Applying the career offender provision, the Presentence Report assigned petitioner to Criminal History Category VI. Presentence Report 11-15; see Guidelines § 4B1.1.

The Presentence Report calculated petitioner's total offense level under the Sentencing Guidelines to be 39—a base offense level of 36 for petitioner's participation in the distribution of 76 kilograms of cocaine and 210 pounds of marijuana (pursuant to Guidelines § 2D1.1), and a three-level upward adjustment for petitioner's role as a manager and/or supervisor in the criminal enterprise (pursuant to Guidelines § 3B1.1(b)). Presentence Report 11-12. The Report noted that "[petitioner's] adjusted offense level is two points higher than the career offense level [of 37]. Therefore, the career offender offense level does not enhance [petitioner's] adjusted

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[2] Guidelines § 4B1.2(2) defines a "controlled substance offense" as an offense "under a federal or state law prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance * * * or the possession of a controlled substance * * * with intent to manufacture, import, export, distribute, or dispense." The commentary to Guidelines § 4B1.2 states that this definition includes "the offense[] of * * * conspiring * * * to commit such offenses." Guidelines § 4B1.2, Application Note 1.

[3] The Presentence Report erroneously stated that the 1978 conviction was for conspiracy to import cocaine, in violation of 21 U.S.C. 952(c). Presentence Report 13. The judgment and conviction in that case show that petitioner was convicted of importation, in violation of 21 U.S.C. 952(a) and 960(a)(1), and not of conspiracy. See Gov't C.A. Supp. Br. Attachment A.

offense level." *Id.* at 12; see Guidelines § 2D1.1, Application Note 1D. Using petitioner's total offense level of 39, the Presentence Report calculated petitioner's Guidelines range to be 360 months' to life imprisonment. Presentence Report 19.

4. The district court adopted most of the findings of the Presentence Report, but found that the Report had overstated the amount of cocaine for which petitioner was accountable. The court recalculated petitioner's total offense level to be 37 (based upon 28 kilograms of cocaine). The court then applied the career offender provision and sentenced petitioner to 360 months' imprisonment. The court also ordered petitioner to pay a fine of $14,000. C.A. Excerpt of Record 46-53 (Findings of Fact and Statement of Reasons).

5. The court of appeals affirmed petitioner's conviction and sentence. Pet. App. 1-14. It first upheld the Sentencing Commission's inclusion of conspiracy within the definition of a "controlled substance offense" for purposes of the career offender provision.[4] *Id.* at 6-7. Although the commentary to Guidelines § 4B1.1 states that the career offender Guideline is intended to implement the mandate of 28 U.S.C. 994(h), the court noted, that commentary does not suggest that Section 994(h) is the sole legal authority for the career offender provisions. Pet. App. 6. Noting that the Guidelines as a whole were promulgated by the Commission pursuant to 28 U.S.C. 994(a), the court held that the Commission had lawfully exercised its authority when it included conspiracy within the definition of "controlled substance offense" for purposes of the career offender provision. Pet. App. 6. The court also cited legislative history in

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[4] Petitioner raised that issue in a letter to the court of appeals shortly before oral argument. The court then sought supplemental briefing on the issue. See Pet. 13-14.

support of its view that Section 994(h) was not intended to limit the types of cases to which career offender status could apply. Pet. App. 6-7.

In a separate, unpublished opinion, the court of appeals held that the district court had not abused its discretion in denying petitioner's motion for a continuance. Pet. App. 11-14. The court stated that the district court had "sufficient legitimate reasons" to justify the denial of petitioner's motion. *Id.* at 13. Although the district court had "mention[ed]" that defense counsel "voluntarily undertook the appointment," it had also "carefully considered the difficulty of preparation for a case of this nature," as well as the effect of delay on judicial economy, before concluding that 40 days was sufficient to prepare for trial. *Ibid.* The court of appeals also held that petitioner had not demonstrated prejudice from the denial. *Id.* at 13-14.

## ARGUMENT

1. Petitioner contends (Pet. 21-22) that conspiracy to distribute controlled substances may not validly be treated as a predicate crime in applying the career offender provision of the Sentencing Guidelines. Although there is a split among the circuits on this issue, petitioner's claim does not warrant further review. The Sentencing Commission has proposed an amendment to the commentary to Guidelines § 4B1.1 that will resolve the dispute.

a. Sentencing Guidelines § 4B1.1 sets forth the conditions for sentencing a defendant as a career offender. The background commentary to Guidelines § 4B1.1 states that the Guideline "implements th[e] mandate" of 28 U.S.C. 994(h). Section 994(h) directs the Sentencing Commission to "assure" that the Guidelines specify a sentence "at or near the maximum term authorized" for a defendant who is at least 18 years old,

> (1) has been convicted of a felony that is
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a) [subsequently transferred to 46 U.S.C. 1901] * * *,

and has previously been convicted of two or more felonies, each of which is a crime of violence or a controlled substance offense as set forth in Subsection (1)(B) above. Conspiracy to distribute controlled substances, see 21 U.S.C. 846, is not among the "offense[s] described in" the drug trafficking statutes enumerated in Section 994(h)(1)(B).

The Sentencing Commission's treatment of conspiracy offenses therefore is not subject to the express directive of 28 U.S.C. 994(h). The Commission acted reasonably, however, in determining that conspiracy to distribute controlled substances should constitute a predicate offense for purposes of the career offender provision. The Commission's approach furthers the substantial federal interest in uniform sentencing, one of the primary objectives of the Guidelines. See *Mistretta* v. *United States*, 488 U.S. 361, 365-366 (1989); 28 U.S.C. 991(b)(1)(B), 994(f); see also *United States* v. *Beasley*, 12 F.3d 280, 283 (1st Cir. 1993). Treating drug trafficking conspiracies in the same way as substantive trafficking offenses ensures that repeat offenders who engage in conspiracies incur the same enhanced penalties as those who commit the underlying crimes.

The legislative history confirms that the Commission's treatment of conspiracy offenses was well within its statutory authority. Section 994(h) was

intended "as a floor for the career offender category, not as a ceiling." *United States* v. *Hightower*, No. 93-5117 (3d Cir. May 31, 1994), slip op. 7 (quoting *United States* v. *Parson*, 955 F.2d 858, 867 (3d Cir. 1992)). Section 994(h) was "not necessarily intended to be an exhaustive list of types of cases in which the guidelines should specify a substantial term of imprisonment, nor of types of cases in which terms at or close to the authorized maxima should be specified." S. Rep. No. 225, 98th Cong., 1st Sess. 176 (1983). Two courts of appeals in addition to the court below have expressly recognized the Sentencing Commission's authority to include drug conspiracy among the predicate offenses for career offender status. See *United States* v. *Allen*, No. 92-1225 (10th Cir. May 5, 1994), slip op. 14-16; *Hightower*, slip op. 8-10. See also *United States* v. *Fiore*, 983 F.2d 1, 2-4 (1st Cir. 1992) (holding, as a matter of Guideline interpretation, that conspiracy conviction can serve as predicate offense for purposes of career offender provision), cert. denied, 113 S. Ct. 1830 (1993). Cf. *United States* v. *Whitaker*, 938 F.2d 1551, 1552 (2d Cir. 1991) (accepting without comment inclusion of drug conspiracy conviction in career offender Guideline), cert. denied, 112 S. Ct. 977 (1992); *United States* v. *Jones*, 898 F.2d 1461 (10th Cir.), cert. denied, 498 U.S. 838 (1990).[5]

b. Petitioner correctly contends (Pet. 22) that the court of appeals' decision conflicts with *United States* v. *Price*, 990 F.2d 1367 (D.C. Cir. 1993), in which the court vacated a career offender sentence imposed for a drug

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[5] Similarly, several courts have upheld the Sentencing Commission's authority to include state law convictions under the career offender provision. See, *e.g.*, *United States* v. *Consuegra*, No. 93-3690MN (8th Cir. Apr. 21, 1994); *United States* v. *Beasley*, 12 F.3d 280, 283-284 (1st Cir. 1993); *United States* v. *Rivera*, 996 F.2d 993, 995-996 (9th Cir. 1993); *United States* v. *Whyte*, 892 F.2d 1170, 1174 (3d Cir. 1989), cert. denied, 494 U.S. 1070 (1990).

conspiracy conviction. The court in *Price* noted that the drug trafficking felonies enumerated in 28 U.S.C. 994(h) do not include drug conspiracies. 990 F.2d at 1369. A conspiracy to commit a crime, the court held, "involves quite different elements" from the underlying substantive crime, and thus cannot be said to be an offense "described in" Section 994(h)(1)(B). 990 F.2d at 1369. The court acknowledged that the Sentencing Commission "may well be free under § 994(a) to specify equally long terms for defendants not covered by § 994(h)." *Ibid.* Based upon the background commentary to Guidelines § 4B1.1, however, the court concluded that the Commission's promulgation of the Guideline had been based solely upon 28 U.S.C. 994(h). 990 F.2d at 1369. Because it found the "stated basis" for the Commission's action to be "inadequate for Application Note 1's inclusion of conspiracies," the court held that Price could not be subjected to an enhanced term of imprisonment based on the career offender provision. *Id.* at 1370.

The conflict between *Price* and the decision in this case does not warrant this Court's review. The court in *Price* did not hold that the Commission lacks authority to treat drug conspiracies as predicate crimes for purposes of the career offender provision. Rather, the court held that the Commission had provided a legally invalid explanation of its decision to do so. See 990 F.2d at 1369-1370. That purported defect[6] is fully remediable

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[6] The holding in *Price* has not been followed in other circuits, and we believe that the decision was incorrect. Although the background commentary to Guidelines § 4B1.1 refers only to the mandate of 28 U.S.C. 994(h), nothing in that commentary suggests that Section 994(h) is the sole legal authority for the career offender provision. The Guidelines as a whole are promulgated pursuant to the Commission's general authority under 28 U.S.C. 994(a). See Sentencing Guidelines Ch. 1, Pt. A, § 1. Other courts

by the Commission itself. On December 21, 1993, the Commission published for comment a proposed amendment to the Sentencing Guidelines that "responds to [the] recent decision * * * in *United States* v. *Price*." See 58 Fed. Reg. 67,522, 67,532 (1993). The proposal would amend the background commentary to Guidelines § 4B1.1 to provide, in pertinent part, that:

> the definition of a career offender [under Guidelines § 4B1.1] track[s] in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct * * *" 28 U.S.C. 991(b)(1)(B). * * *

58 Fed. Reg. 67,532 (1993).[7] In light of that proposal, there is no need for this Court to address the issue. See

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of appeals have upheld the application of Guidelines § 4B1.1 to conspiracy offenses despite the Commission's failure to cite, in its background commentary, sources of authority in addition to Section 994(h). See *Allen*, slip op. 14-16; *Hightower*, slip op. 8-10.

[7] The proposed amendment was not among those amendments the Commission transmitted to Congress on April 28, 1994. See 59 Fed. Reg. 23,608 (May 5, 1994). Nonetheless, it is the Commission's statutory obligation periodically to review and revise the Sentencing Guidelines in light of the work of the courts. *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). Amended commentary "is binding on the federal courts even though it is not reviewed by Congress, and prior judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation" consistent with the Guidelines as a whole and with

*Braxton* v. *United States*, 500 U.S. 344, 348-349 (1991) (declining to review issue of Guidelines interpretation, in part "because the Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning" of the Guideline in question).[8]

2. Petitioner renews his contention (Pet. 23-26) that the district court abused its discretion in denying his motion for a continuance. That claim does not warrant further review.

This Court has held that "broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." *Morris* v. *Slappy*, 461 U.S. 1, 11-12 (1983) (quoting *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964)). "The party seeking a continuance generally must show that a delay is necessary for a just determination of the case." *United States* v. *Clinger*, 681 F.2d 221, 223 (4th Cir.), cert. denied, 459 U.S. 912 (1982).

The district court concluded that petitioner's case was not so difficult as to require more than 40 days for preparation by his attorney, particularly in light of the government's open file policy and the fact that most of the documents and other evidence had already been

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the authorizing statute. *Stinson* v. *United States*, 113 S. Ct. 1913, 1919 (1993).

[8] Petitioner also contends (Pet. 21-22) that this Court's review is necessary to resolve the degree of deference courts should give the Sentencing Commission. In *Stinson*, this Court addressed the question whether the commentary of the Sentencing Guidelines is binding on the federal courts. The Court held that Guidelines commentary that interprets or explains a guideline is "authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." 113 S. Ct. at 1915.

assembled in preparation for the co-defendants' trials. The court also found that judicial economy favored trying all defendants together. Finally, as the court of appeals noted, see Pet. App. 13-14, petitioner failed to demonstrate that he was prejudiced by the denial. Petitioner's challenge to the district court's ruling raises no issue warranting this Court's review.[9]

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[9] Petitioner contends that the court of appeals endorsed the "proposition that when an attorney accepts appointment as a defense counsel he * * * impliedly waives any right to a reasonable continuance in order to adequately prepare for trial." Pet. 24. The Ninth Circuit merely noted, however, the district court's reference to counsel's voluntary acceptance of the appointment. Its affirmance of the district court's ruling was based on its conclusion that *other* reasons offered by the district court were sufficient to justify the denial of a continuance. See Pet. App. 13.

In opposing petitioner's motion for reconsideration of the denial of a continuance, government counsel stated: "I would suspect that 95 percent of the information the jury will rely on to convict [petitioner] comes out of his own mouth." I Tr. 12. Petitioner claims (Pet. 25-26) that this statement misled the district court. Whatever the exact percentages involved, the record makes clear that much of the evidence against petitioner came from taped conversations. See Gov't C.A. Br. 27-35. The district court did not cite the 95 percent figure, noting only that "the government contends the evidence to be used against [petitioner] comes primarily from [petitioner's] own statements." C.A. Excerpt of Record 17. There is no basis for petitioner's assertion that the district court's ruling was "tainted" (Pet. 25) by the government's characterization of the evidence.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1994